TABLE OF CONTENTS

	Page
Table of Authorities	ii
Issues Presented for Review	1
Statement of the Case	2
Argument	3
General On-the-scene Questioning	3
Questions as to Personal Identification	4
Burden of Proof	6
Cruel and Unusual Punishment	7
Conclusion	9

TABLE OF AUTHORITIES

CASES: *Page*

California v. Byers, 91 S.Ct. 1535 (1971) 5

Castle v. United States, 399 F.2d 642 (5th Cir. 1968) 7

Chapman v. California, 386 U.S. 18 (1967) 6

Davis v. Mississippi, 394 U.S. 721 (1969) 5

Farrie v. State, 266 N.E.2d 212 (Ind. Sup. Ct. 1971) 5

Hedrick v. United States, 357 F.2d 121 (10th Cir. 1966) 7

Henderson v. Dutton, 395 F.2d 209 (5th Cir. 1968) 7

Lacaze v. United States, 391 F.2d 516 (5th Cir. 1968) 7

Miranda v. Arizona, 384 U.S. 436 (1966) 1, 3, 4, 5

People v. Fischetti, 264 N.E.2d 191 (Ill. Sup. Ct. 1970) 4

Rodriguez v. United States, 394 F.2d 825 (5th Cir. 1968) 7

Smith v. United States, 273 F.2d 462 (10th Cir. 1959) 7

State v. Barnes, 245 S.2d 108 (Fla. Ct. App. 1971) 4

United States v. Hall, 10 Cr. L. 2177 (U.S.D.C. N.N.Y. 1971) 4

United States v. Martell, 335 F.2d 764 (4th Cir. 1964) 7

United States v. Pruitt, 341 F.2d 700 (4th Cir. 1964) 7

United States v. Sullivan, 274 U.S. 259 (1927) 5

OTHER AUTHORITIES:

Annotation, 25 A.L.R. 3d 1076 4

Annotation, 31 A.L.R. 3d 565 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-794

GERALD LEE JOHNSON, *Petitioner*

vs.

STATE OF INDIANA, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ISSUES PRESENTED FOR REVIEW

1. Whether a police officer who, in the course of the investigation of a disturbance, learns that a person is carrying a pistol on his person is required to inform the individual of his rights before inquiring whether the person has a permit to carry the weapon.

2. Whether the questioning of a person under arrest as to personal information such as name, address, physical characteristics, etc. is interrogation within the terms of *Miranda v. Arizona*.

3. Whether the State improperly imposed upon petitioner at trial the burden of proof as to whether he had been issued a license to carry a pistol,

4. Whether a sentence of imprisonment, upon recommendation by the jury, for a period of time within the limits provided by statute, may be considered cruel and unusual punishment.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is substantially correct. One point of disagreement is noted. Petitioner states that "the Supreme Court of Indiana held that the burden on that issue [the sufficiency of the evidence that Petitioner had not been issued a license to carry the pistol] was on the defendant". (Pet. for Writ, p. 13). Such was not the holding of the Indiana Supreme Court. The language in the opinion to which this statement apparently applies (Pet. for Writ, p. 31) does not reach the status of a holding. The State presented a prima facie case that Petitioner had not been issued such a permit through the testimony of three witnesses.

Hershell Green, Supervisor of Records of the Indiana State Police, testified that he was in charge of the department of that agency which processes the applications for pistol permits and issues such permits. (Tr. p. 171). He further testified that the records of the Indiana State Police contained no license granting Petitioner permission to carry a pistol on October 5, 1968. Similar testimony that Petitioner had not been granted a permit was given by John Carrick, police officer in charge of gun permit applications for the city of Muncie, Indiana, (Tr. p. 177), and by Harry Howard, Sheriff of Delaware County, who also keep records of applications for licenses and issuances of licenses. (Tr. p. 178).

ARGUMENT

I.

PETITIONER'S ADMISSION THAT HE DID NOT HAVE A LICENSE WAS PROPERLY ADMISSIBLE.

Muncie Police Officers Buchanon and Fensel, investigating a disturbance, learned that Petitioner had a gun on his person, which weapon Petitioner handed to Officer Buchanon, (Tr. p. 149). Officer Buchanon then asked Petitioner whether he had a license to carry the gun. The reply was that he had no such permit. (Tr. p. 157). Petitioner was not advised of his rights under *Miranda*. (Tr. p. 152).

The issue is whether the questioning of Petitioner as set out here was interrogation in which the warnings set by this Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), were required. The decision of the Indiana Supreme Court is clearly consistent with *Miranda*.

Miranda concerned itself with interrogation under coercive circumstances. It specifically did not apply to on-the-scene, non-custodial questioning.

> "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." 384 U.S. at 477-478.

When the police officers arrived on the scene, they already had information that someone there was carrying a gun. Their first concern was to locate the weapon, which

might be used against them. As the opinion of the Indiana Supreme Court stated:

> "This certainly is no time for the police officer to stop and conduct a course in constitutional law for the benefit of all present." (Pet. for Writ, p. 27).

The question whether Petitioner had a license was still general questioning, since a negative answer would have required other fact finding process. The officers did not have sufficient information at the time the question was asked to know whether a crime had been committed. Such general questioning has repeatedly been held not to be within the scope of *Miranda* by a number of state and federal Courts. Many of these cases are collected in annotations at 25 ALR 3d 1076 and 31 ALR 3d 565. See particularly 31 ALR 3d at 613-620. See also *People v. Fischetti*, 264 N.E.2d 191, (ILL. Sup. Ct. 1970); *State v. Barnes*, 245 S.2d 108 (Fla.Ct.App. 1971); *U.S. v. Hall*, 10 Cr. L. 2177 (U.S.D.C. N.N.Y. 1971). Thus, Petitioner has not presented an issue appropriate for further consideration by this Court.

II.

TESTIMONY OF PETITIONER'S STATEMENTS OF PERSONAL DATA WAS NOT REVERSIBLE ERROR.

When Petitioner was being booked at the police headquarters after his arrest, he was asked certain questions without being given any *Miranda* warnings. These questions, though, were limited to matters of name, address, age, place of birth, place of employment and physical description. (Tr. pp. 166-169).

Petitioner's argument is that knowledge of his identity by the State enabled it to prove that no pistol permit had

been issued to him. The issue is thus whether the *Miranda* exclusionary rule applies to routine questioning during the booking of a prisoner as to his identity. There is no indication that the questions were intended as interrogation as to any criminal activity or were asked for the purpose of gaining information to be used against Petitioner at trial.

The position of the Indiana Supreme Court, which appears also to be the position taken by this Court in prior cases, is that the privilege against self-incrimination does not extend to questions merely going to identity. As this Court recently stated, "Disclosure of name and address is an essentially neutral act." *California v. Byers,* 91 S.Ct. 1535 at 1540 (1971). See also *United States v. Sullivan,* 274 U.S. 259 (1927).

(It should be noted that the only illegality claimed to have existed in the questions asked as part of the booking procedure was the failure to give the *Miranda* warnings. Thus the decision of this Court in *Davis v. Mississippi,* 394 U.S. 721 (1969) is not applicable.)

Even were Petitioner's contention as to the applicability of *Miranda* correct, he still would not be entitled to relief. There is no showing that the knowledge of identity which the State possessed came from the questioning. The same information was derived from other, independent sources. One source was a security and inventory search of the contents of Petitioner's wallet. (Tr. p. 169). Such a search has been held constitutional by the Indiana Supreme Court in *Farrie v. State,* 266 N.E.2d 212 (1971), and the constitutionality of that search is not raised as an issue here. It might also be presumed that the booking process included fingerprinting, which would give this same information in the event Petitioner had ever previously been finger-

printed. The record also shows that Sheriff Howard, one of the witnesses on the issue of whether Petitioner had the required license, knew Petitioner. (Tr. pp. 177-179).

Given all these sources of information, there is no showing that the information used at trial was actually based on the questioning of Petitioner. And even if that were the source of knowledge, these alternate sources of information would make any error harmless. *Chapman v. California*, 386 U.S. 18 (1967).

III

THE STATE OF INDIANA DID NOT IMPROPERLY IMPOSE ON PETITIONER THE BURDEN OF PROOF.

Petitioner argues that the burden of proving his possession or non-possession of a pistol permit was imposed upon him. He does not show, however, how he was so imposed upon and in fact no burden of proof was imposed on him. While there was dicta in the opinion which might be read to state that no proof was necessary from the State, the opinion also recognizes that the State at trial did present a prima facie case that Petitioner had not been issued a permit. The keeper of gun license records for the Indiana State Police, the agency which issues such permits, testified that the record of his agency contained no license issued to Petitioner for the relevant time period. (Tr. p. 174).

Similar testimony was given by the Muncie City Police Officer in charge of processing applications for gun permits, (Tr. p. 177), and by the Sheriff of the county. (Tr. p. 178). If such a license had been applied for, the application would have been processed through one of those two offices and a record retained.

Respondent does not here admit that Petitioner's argument of law is valid. That argument is merely irrelevant so as to require no argument of law. It is respectfully submitted that this Court need not concern itself with hypothetical issues.

IV.

THIS CASE DOES NOT PRESENT ANY SUBSTANTIAL QUESTION OF CRUEL OR UNUSUAL PUNISHMENT.

Petitioner's argument that the sentence assessed in this case was excessive was dealt with summarily, as being totally without merit, by the Indiana Supreme Court. Petitioner now objects to this treatment of his claim. The language objected to in the opinion below is similar to that found in numerous cases. One example will be given here.

> "The cases are legion that a sentence within the statutory limits is not cruel and unusual punishment. See *Hedrick v. United States,* 10 Cir. 1966, 357 F.2d 121; *United States v. Pruitt,* 4th Cir. 1964, 341 F.2d 700; *United States v. Martell,* 4th Cir. 1964, 335 F.2d 764; *Smith v. United States,* 10th Cir. 1959, 273 F.2d 462. As stated in *Rodriguez* [*v. United States,* 5th Cir. 1968, 394 F.2d 825];
>
> 'If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by statute.'
>
> Other recent decisions of this Court agree that "a sentence within the statutory limits is not reviewable on appeal and does not ascend to the orbit of a constitutional violation." See *Henderson v. Dutton,* 5th Cir. 1968, 395 F.2d 209; *Lacaze v. United States,* 5th Cir. 1968, 391 F.2d 516." *Castle v. United States,* 399 F.2d 642 (5th Cir. 1968).

The facts of this case clearly show that the sentence given was not disproportionate to the offense. Petitioner had previously exposed himself and made an obscene proposal to a woman on the street. (Tr. pp. 128 and 129). That woman, in the incident giving rise to this case, recognized Petitioner while driving on the Muncie streets and pointed him out to her husband, who followed Petitioner's car. (Tr. pp. 125, 126, 130). When the cars stopped, the husband approached Petitioner's car and asked to talk to him. Petitioner thereupon drew the gun from his pocket and fired it. The men then scuffled for possession of the gun until police arrived. (Tr. pp. 139-140).

The sentence in this case, imprisonment for six years, was assessed by the trial court upon the verdict of the jury. For a person who carries a firearm illegally and who draws and fires that weapon when approached (but not attacked) by another, to argue that he is subjected to extreme and disproportionate punishment by a sentence, assessed by a jury, of six years imprisonment does not raise any substantial issue for decision by this Court.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

DARREL K. DIAMOND
Deputy Attorney General

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: 317-633-5512
Attorneys for Respondent